# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION TWENTY-FIVE SUBREGION THIRTY-THREE

AMERICOLD LOGISTICS, LLC. Employer,

and 25-RD-102210

KAREN COX

Petitioner,

and

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, UFCW, LOCAL 578 Intervenor

## **DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on April 19 and 23, 2013, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine if a recognition bar precludes the processing of the petition.<sup>1</sup>

#### I. ISSUE

The Petitioner seeks a decertification election within a unit comprised of the approximately 109 individuals employed by the Employer in its two warehouse facilities in Rochelle, Illinois. The Petitioner and the Employer contend that a reasonable time to bargain has passed since the Employer voluntarily recognized the Intervenor, hereinafter called the Union, as the collective bargaining representative of the employees, and therefore, no recognition bar to an election exists. The Union contends that the petition should be dismissed because a reasonable

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.

<sup>&</sup>lt;sup>1</sup> Upon the entire record in this proceeding, the undersigned finds:

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

c. The labor organization involved claims to represent certain employees of the Employer.

d. No question affecting commerce exists concerning the representation of certain employees of the employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

time to bargain has not passed since the Employer voluntarily recognized it as the exclusive collective-bargaining agent of the employees based upon the factors set forth by the Board in *Lamons Gasket Company, a Division of Trimas Corporation,* 357 NLRB No. 72 (August 26, 2011) (citing *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001)).

### II. DECISION

For the reasons discussed in detail below, including the application of the *Lee Lumber* reasonable time for bargaining standard applied to voluntary recognition situations in Lamons Gasket, I find that a recognition bar to an election exits precluding the processing of the petition. First, the petition violated the bright-line rule that petitions will not be processed if filed within the six months following the first negotiation session. Lamons Gasket 357 NLRB at slip op. 10. The petition in this case was filed on April 8, 2013, one day before the expiration of the six month insulated period which began October 9, 2012. Furthermore, application of the Lee Lumber multifactor standard demonstrates in these circumstances that the Union was not given a reasonable time to bargain. The time for bargaining was significantly abbreviated by the Employer's unavailability for bargaining for a full three month period within those six months. The parties are negotiating for an initial contract with somewhat complex issues such as seniority rights in the two-facility unit and health care provisions. Both parties agreed that they were not at impasse. The parties made significant progress towards an agreement considering the absence of three months of negotiation time. The totality of these factors reveals that a reasonable time for bargaining following the Employer's voluntary recognition has not elapsed at the time the instant petition was filed. Therefore, I find that a recognition bar to an election existed at the time the petition was filed and it is dismissed.

#### III. STATEMENT OF FACTS

The Employer operates over 100 food storage warehouses nation-wide including two located in Rochelle, Illinois. The Rochelle, Illinois warehouses are separated by approximately a half mile with one being located on Americold Drive and the other Caron Road. The Employer has operated the Americold Drive warehouse since at least 1993 and purchased the Caron Road warehouse in 2009. The Americold Drive warehouse is a perishable/cold food storage facility, and the Caron Road warehouse is a dry goods storage facility. Initially, the Caron Road employees received a higher hourly wage than the Americold Drive employees. At some point prior to 2012, the Employer increased the Americold Drive employees' wages to match that received by the Caron Road employees.

The Employer is party to approximately 60 collective-bargaining agreements but none with the Union. The Americold Drive warehouse employees were represented by the Teamsters for some period ending in 2004. The Union attempted to organize those employees in 2007 but lost the election. The Union attempted to organize both of the facilities in 2009 and again lost the election. The Union conducted another organizing drive during the first half of 2012 and filed a petition for election in May. The Employer agreed to a card check by a neutral party who found that the Union had valid authorization cards from 70 out of the 123 employees. The

parties signed a recognition agreement that went into effect on June 18, 2012 for the following bargaining unit ("Unit"):

All full-time and regular part-time warehouse employees, including warehouse employees, janitorial employees, and porter employees employed by the Employer, at its Rochelle, Illinois warehouses; but excluding office clerical employees, maintenance employees, customer service representatives, foremen, temporary employees, guards, and supervisors as defined in the Act.

As a result of the Employer's voluntary recognition, the Union withdrew its petition for election.

The Union's practice is to elect Union stewards and meet with the employees to determine their goals in collective-bargaining before initiating bargaining. This process was somewhat more difficult in this situation because the Americold Drive warehouse operates on three shifts while the Caron Road facility operates on six shifts. As a result of these various shifts and communication problems, the Union held two meetings to elect Union stewards and approximately six meetings to discuss collective-bargaining issues.

Thereafter, the Union submitted a lengthy information request to the Employer on July 30, 2012. The Employer fully responded on August 16, 2012, with the exception of a near 6 month delay in providing information concerning the employee-plus-one health insurance policy it offers employees. The Union's Business Agent testified that the Union requested to bargain with the Employer in September 2012, but his testimony was vague and the record is unclear when that request was made. The Employer responded that it had no dates available in September to initiate bargaining.

The Employer and Union met for bargaining for the first time on October 9, 2012. During this first meeting the Employer presented a "model" contract proposal with wage rates set at the employees' current rates. This model formed the foundation for bargaining. The parties met again on October 10 and 11, 2012. Because some participants were traveling significant distances, they usually scheduled bargaining for three consecutive days from about 9:00 A.M. to about 4:00 P.M. the first two days and then 9:00 A.M. to midday on the third day. The parties made some progress in reaching tentative agreements on non-economic language during their October meetings.

The parties met again on November 27, 28, and 29, 2012 and were able to tentatively agree on language provisions. The Union's Business Agent testified that the Employer's proposed clause regarding management rights was significantly different than such clauses in the Union's other contracts, therefore, taking longer than usual to negotiate that provision. The Union's Business Agent also testified that issues regarding seniority in layoffs, recall, overtime, etc. and the scheduling of employees to interchange between the two facilities took longer to negotiate than with one facility units, partially due to the vast differences in workloads between the two warehouses. The Employer representative involved in negotiations beginning in March characterized the negotiations as routine and not involving complex issues. However, he was not present during much of the negotiations on the issues described above.

After the November bargaining sessions, negotiations came to a halt for three months due to the Employer's unavailability. The Union requested to bargain in December and early January 2013 however, the Employer was unavailable until dates in the week of January 21, 2013. Thereafter, the Employer cancelled those bargaining dates due to the serious illness of a family member of the Employer's lead negotiator. The parties attempted to reschedule the negotiations for February 4-6, 2013, but the Employer informed the Union that it was unavailable for the entire month of February. Finally, the Employer brought in another person to act as lead negotiator due to the unavailability of their original lead negotiator. According to the Union, this change of negotiators slowed bargaining during the first few negotiation sessions in March, because the new negotiator lacked familiarity with the Rochelle warehouses and it took time for him to become familiar with the facilities and bargaining issues. The Employer does not indicate that the change in negotiators created any additional impediment to bargaining. The Employer switched back-and-forth between its two lead negotiators during the following negotiation sessions, but there is no evidence in the record that this hampered bargaining.

The parties' conducted bargaining sessions on March 4, 5, 6, 11, 12, 13, and 16, 2013. By the end of negotiations on March 16, the parties had tentatively agreed on virtually all the non-economic terms of the contract and started negotiations on economic terms. With regards to economic terms, the Union requested that the Employer consider its health and welfare benefits. The negotiations over the health and welfare benefits, were somewhat hampered by the fact that the Employer did not provide the Union with information about its employee-plus-one health insurance policy until March 2013. However, the Union overlooked receiving the information attached to the March email. As a result the Union did not review that information until the Employer provided it again on April 16, 2013. At the time of the hearing, the Employer was waiting for the Union to respond with cost information concerning the employee-plus-one health insurance Union provided benefit plan.

During the April 9 and 16, 2013 bargaining meetings, only one additional contract provision, the 401(k) provision, was orally agreed upon and needed to be signed off in writing at the next negotiation meeting. Other than the 401(k) provision all of the other economic provisions of the contract are still at issue including wage rates, vacation, medical insurance, dental insurance, short and long term disability insurance, and life insurance. The Union provided the Employer with a proposal informing the Employer that its wage proposal is dependent upon the health and welfare package offered by the Employer. The parties agreed to meet again for three days of bargaining during the week of May 6, 2013. Neither party asserts that they are at impasse and both the Union's negotiator and the Employer's negotiators testified that bargaining had progressed in a fairly smooth fashion.

On April 8, 2013, the Petitioner filed the petition in this case. Since the first negotiation meeting occurred on October 9, 2012, the petition was filed one day short of six months after negotiations commenced. This was the second decertification petition filed by the Petitioner. That petition in Case 25-RD-093419 was filed on November 19 and dismissed on November 31, 2012.<sup>2</sup>

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<sup>&</sup>lt;sup>2</sup> Administrative notice is taken of the date the first RD petition was filed.

#### IV. DISCUSSION

#### A. The Law

As the Supreme Court recognized in *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944), "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." Underlying that principal is the recognition that "a union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out." In *Lamons Gasket Co.*, 357 NLRB No. 72 (Aug. 26, 2011), the Board relied upon this rationale in holding that an Employer's voluntary recognition bars an election for a reasonable period of time. The Board defined a reasonable period of bargaining to be "no less than 6 months after the parties' first bargaining session and no more than 1 year." *Lamons Gasket*, 357 NLRB at slip op. 10. <sup>3</sup>

In determining whether a reasonable period has elapsed, the Board applies a multifactor test that considers: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001). The Board held that these safeguards were necessary in order to allow the union to "test its mettle" in representing the employees.

The burden of proving that a reasonable period of time for bargaining has not elapsed rests with the Union because it is the party asserting the recognition bar. *See, e.g. UGL-UNICCO Service Company*, 357 NLRB No. 76, fn 31 (August 26, 2011) (the burden of proof will be on the party who invokes the "successor bar" to establish that a reasonable period of bargaining has not elapsed); *In re Coca-Cola Enterprises, Inc.*, 352 NLRB 1044, 1045 (2008) (citing *Roosevelt Memorial Park*, 187 NLRB 517 (1970)) (the burden of proving the existence of a contract bar rests upon the party asserting the doctrine).

# B. Application of the "Reasonable Period of Bargaining" Factors to this Case

The petition in this matter was filed one day short of the six months after bargaining was initiated. Although the petition does not meet the bright-line rule of being "no less than 6 months after the parties' first bargaining session," it was filed only one day short of that time frame. Therefore, the Board's multifactor test to determine if a reasonable period of time for bargaining has elapsed will also be considered.

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<sup>&</sup>lt;sup>3</sup> The Board notes in *Lamons Gasket* that it was not making "changes to established law regarding secret-ballot elections" and that "an election remains the only way for a union to obtain Board certification and its attendant benefits" including a 12-month bar to election petitions under Section 9(c)(3). *Id.* at slip op. 10.

## 1. Bargaining for an Initial Contract

As noted above, this is a voluntary recognition case; therefore, the parties are bargaining an initial contract. This factor often weighs against a finding that a reasonable period of time has elapsed because bargaining for an initial contract often involves "special problems," including establishing basic bargaining procedures and difficulties in "hammering out fundamental procedures, rights, wage scales, and benefit plans in the absence of previously established practices." *Lee Lumber*, 334 NLRB at 403.

The Union presented evidence to support a finding that the parties' new relationship had impacted bargaining. The Union's Business Agent testified that the Union's unfamiliarity with the type of management rights clause that the Employer contends is "model" language from its other contracts resulted in a significant amount of time spent negotiating over this language. Also, the Union noted that the practice of having six shifts in one facility and three in the other facility caused difficulty in negotiating issues such as how seniority would affect selection for layoffs, overtime, etc. There is also evidence that additional time has been taken to negotiate benefit plans because the Union is presenting its benefit plans to the Employer for the first time. This process was delayed first by the Employer inadvertently failing to provide the Union with information about its employee-plus-one dependent insurance plan for at least seven months. Once the Employer provided the information, the Union apparently overlooked receiving this information that was attached to an email for nearly a month. These delays in negotiation, caused mostly by lack of familiarity between the parties, serve as examples of the kind of difficulties the Board was attempting to account for in considering whether the parties were negotiating for a first contract. Even though the Union's evidence is not overwhelming, it does tip slightly in favor of the Union's position as to this factor.

# 2. Complexity of the Issues and Bargaining Process

The Employer and Petitioner characterize the bargaining in the instant case as involving traditional issues and bargaining procedures. In contrast, both parties point to *MGM Grand Hotel*, 329 NLRB 464(1999) as an example of what the Board considers to be complex issues and processes. In that case the Board found that a reasonable period had not elapsed in part due to the innovative, complex and time-consuming approach to bargaining. The union in that case formed committees and subcommittees of both union representatives and employees to study and evaluate each aspect of the contract. Additionally, the unit was comprised of 3100 employees in over 53 classifications at a hotel, casino and several restaurants.

The Union, however, argues to the contrary and presented some evidence that negotiations dealt with complex issues. These issues included how to deal with interaction of seniority rights between the two facilities and how those rights affected employees' layoff, recall, and overtime rights under the contract proposals. The Union also contended that the Employer's proposed clause regarding management rights consumed a considerable amount of bargaining time because the Union was unfamiliar with the language proposed by the Employer. Finally, the Union contends that the health and welfare provisions are complex because the Union is attempting to compare what it can offer to what the Employer offers. Additionally, the effects of the Affordable Care Act on the Employer are not fully understood by the parties. The

Union's evidence concerning how the complexity of these issues extended bargaining, however, was vague.

It does not appear that the parties were facing unusually complex issues or had adopted complicated approaches to bargaining. However, this factor is outweighed by the other factors, including the actual time spent bargaining and availability of the parties, discussed below.

## 3. Passage of Time and Number of Bargaining Sessions

The Employer and Petitioner contend that the nearly four months between when the Employer recognized the Union and the first day of negotiations should be counted against the Union in determining if a reasonable period of time for negotiations has passed. The Union presented evidence that it took longer than usual for the Union to establish its bargaining committee and strategies because the Unit involves two facilities where one facility works on six shifts and the other on three shifts. This caused communication problems which resulted in the Union having to hold two meetings to elect Union stewards. Also, it is the Union's practice to meet with the employees to gather their input on contract negotiations. Because of the different shifts at the two facilities, the Union conducted six meetings to gather that input. The Union then submitted a comprehensive request for information to the Employer on July 30, 2012, and received a timely response from the Employer on August 16, 2012. Shortly thereafter the Union requested bargaining dates in September but the Employer was not available until October. Therefore, the evidence reveals that it was only a little over two months between recognition and the Union's request to bargain. Because of the new relationship between the Union and the employees as well as between the Union and the Employer, the time the Union took to initiate bargaining should not alter the standard applied in *Lamons Gasket* extending the recognition bar for "no less than 6 months after the parties' first bargaining session."

The Union points to the Employer's unavailability to meet for three months during the six month period initiated by the first negotiating meeting as a substantial factor in preventing the parties from having a reasonable time to bargain. The parties negotiated only six times prior to the three-month hiatus. After the hiatus they only met for six more bargaining sessions before the petition was filed on April 8, 2013. The parties bargained on two more occasions prior to the hearing. Although the number of times that the parties bargained is not inconsequential, the three-month gap in negotiations negatively affected the parties' ability to make progress in negotiations. For example, it was not until sometime during the March meetings that the parties realized that the Employer failed to provide the Union with information about the employee-plus-one insurance policy. That information was necessary for the Union to present a complete proposal on health benefits. The Union then overlooked receiving the information causing some additional delay. Such inadvertent delays could have been better absorbed if three months had not passed without a single bargaining session.

In *Lamons Gasket*, the Board noted that lengthy delays in bargaining results in the "undermining of the 'nascent relationship between the employer and the lawfully recognized union.'" *Supra*, at slip op. 10 (citing *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844, 845-846 (1996). Thus, the Employers unavailability for more than 90 days had, in these circumstances, a significant negative impact on the parties' bargaining. This lengthy

unavailability during a critical time for bargaining supports the Union's position that a reasonable time to bargain has not elapsed.

# 4. Extent of Progress Made in Negotiations

In weighing the extent of progress in negotiations, the context of the parties' negotiations must be considered. *Lee Lumber*, 334 NLRB at 404. Thus, if the parties have engaged in a significant amount of bargaining over a six month period and are still not close to an agreement, additional time is unlikely to allow them to reach an agreement. Conversely, the closer the parties are to reaching a contract the more likely additional time will allow them to do so. *Id*. In the instant case, the parties agreed to most of the non-economic terms during their negotiations in March. The parties had just turned their full attention to economic proposals when the petition was filed on April 8, 2013. It is impossible to tell what would have occurred had the parties negotiated during the three months the Employer was unavailable. Although the parties are not close to an agreement, additional time in the context of this case still may facilitate an agreement.

# 5. Presence or Absence of Impasse

The Employer and Union both assert that there is no impasse. The absence of impasse generally weighs against a finding that a reasonable time has elapsed because "there is still hope that [the parties] can reach agreement." *Lee Lumber*, 334 NLRB at 404.

#### C. Conclusion

No one factor in the *Lee Lumber* standard is dispositive or entitled to special weight. Ultimately, "the issue is whether the union has had enough time to prove its mettle in negotiations, so that when its representative status is questioned, the employees can make an informed choice." *Lee Lumber*, 334 NLRB at 405. Based on the evidence in the record and as explained above, I find that overall the factors weigh in favor of finding that the Union did not have a reasonable period of time to "prove its mettle" such that the employees could make an informed choice. Therefore, based on the *Lee Lumber* factors and the fact that the petition was technically filed within the six month period from the initiation of bargaining, I conclude that the recognition bar doctrine, as defined in *Lamons Gasket*, bars an election in this proceeding.

## V. ORDER

Accordingly, the petition for an election amongst the employees represented by the Union and employed by the Employer at its Rochelle, Illinois warehouse facilities, is barred by the Employer's voluntary recognition of the Union and therefore, the petition is hereby dismissed.

# VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business **June 6, 2013**, at 5:00 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.<sup>4</sup> A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at <a href="www.nlrb.gov">www.nlrb.gov</a>. Once the website is accessed, click on File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other

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<sup>&</sup>lt;sup>4</sup> A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

reason, absent a determination of technical failure of the site, with notice of such posted on the website.

SIGNED IN Indianapolis, Indiana, this 23<sup>rd</sup> day of May 2013.

Rik Lineback

Regional Director

National Labor Relations Board

Region 25, Subregion 33

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